

(2023) 01 DEL CK 0031

In the Delhi High Court

Case No : Arbitration Petition No. 204 Of 2020

Parsoli Motors Works Pvt. Ltd.

APPELLANT

Vs

BMW India Pvt. Ltd.

RESPONDENT

Date of Decision : 10-01-2023

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9, 11, 11(6), 12(1), 12(5), 21
Insolvency and Bankruptcy Code, 2016 — Section 14, 14(1), 65

Citation : (2023) 01 DEL CK 0031

Hon'ble Judges : Neena Bansal Krishna, J

Bench : Single Bench

Advocate : Kunal Tandon, Hita Sharma, Diwakar Maheshwari, Aditya V. Singh, Shreyas

Final Decision : Disposed Of

Judgement

Neena Bansal Krishna, J

1. The petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "A&C Act, 1996") has been filed on behalf of the petitioner seeking appointment of Arbitrators.

2. Facts in brief, are that the petitioner is a Private Company and is engaged in the business of selling and servicing of BMW vehicles. The respondent No. 1, Company is engaged in the business of manufacture and dealership of BMW vehicles. The respondent No. 2 is the sister concern of the respondent No. 1, Company and is engaged in the business of providing services ancillary to the sale of the vehicles by the respondent No. 1.

3. It is submitted that the respondent Nos. 1 and 2 are directly or indirectly wholly owned subsidiaries of Bayerische Motoren Werke (BMW) AG, having its registered Office at Bayerische Motoren Werke Aktiengesellschaft Petuelring 130D-80788, Munich, Germany.

4. The petitioner and the respondent No. 1 entered into two separate contracts,

namely the Dealership Agreement for the sale of BMW vehicles in the State of Gujarat in 2007 and the Deferred Payment Facility Agreement (DPFA) dated 15th November, 2010. From time to time, new Agreements were executed or renewal letters were issued to continue the dealership. The last Dealership Agreement was entered into on 14th January, 2015 between the petitioner and the respondent No. 1 the Dealership Agreement dated 14th January, 2015 which last came to be renewed for the period of one year i.e., till 31st December, 2017, vide Letter dated 09th January, 2017. Both the Agreements contain an Arbitration Clause.

5. Similarly, the petitioner entered into two separate Agreements with respondent No. 2 namely, the Floor Plan Financing Agreement dated 15th November, 2010 (hereinafter referred to as "FFA") and the Working Capital Demand Credit Facility Agreement (WCDCFA) dated 28th June, 2014; each of these two Agreements also contained an Arbitration Clause.

6. It is asserted that various disputes have arisen between the petitioner and the respondents essentially in regard to respondent No. 1 permitting other dealers to sell BMW vehicles outside Gujarat thereby causing irreparable loss and injury to the petitioner. The respondent No. 1 has failed to give count of the vehicles sold outside Gujarat to Gujarat customers. The respondent No. 2 is allegedly claiming to have paid the purported outstanding dues of the petitioner towards respondent No. 1 pursuant to the DPFA which allowed the petitioner to make payments for the cars sold by respondent No. 1 in a deferred manner, the financial assistance of which was agreed to be provided by respondent No. 2.

7. The petitioner has stated that the respondent No. 2 has filed an Insolvency Petition bearing No. CP(IB) No. 161/2017 in and around November, 2017 against the petitioner before the National Company Law Tribunal, Ahmedabad (hereinafter referred to as "NCLT") which was admitted on 04th June, 2020 leading to the commencement of the Corporate Insolvency Resolution Process (hereinafter referred to as 'CIRP').

8. Since the petitioner is a corporate debtor before the NCLT, it has to be considered whether a petition under Section 11(6) of the A & C Act, 1996 can be entertained when the Petitioner is under CIRP. The same was under consideration in the judgment of the Hon'ble Supreme Court in New Delhi Municipal Corporation Vs Minosha India Limited, Civil Appeal No. 3470 of 2022, dated 27th April 2022, where it was observed that the taboo to the institution and continuation of various proceedings as envisaged in Section 14 of the Insolvency and Bankruptcy Code, 2016 does not exclude a Petition filed by the Corporate Debtor for the appointment of an arbitrator under section 11(6) of the A & C Act, 1996. For that matter, no proceeding instituted by the Corporate Debtor through the Resolution Professional is barred by the moratorium. The same can be evinced from the language in section 14(1) of the Insolvency and Bankruptcy Code, 2016 which only precludes the institution or continuation of proceedings filed against the Corporate Debtor. Since the corporate debtor, through its

Resolution Professional, in the present case displays an intent to pursue the petition for appointment of arbitrators under section 11(6), the same can be entertained even though the petition under section 7 of the Insolvency and Bankruptcy Code in CP(1B) No. 161 of 2017 stands admitted.

9. It is submitted that the petitioner has also filed the application bearing No. I.A. 300/2018 under Section 65 in CP (IB) No. 161/2017 of the Insolvency and Bankruptcy Code, 2016 against the respondents. The petitioner has also filed the petition bearing No. O.M.P. (I) (COMM.) 559/2017 under Section 9 of A & C Act, 1996 seeking various reliefs against the respondents. The said petition was dismissed vide Order dated 15th January, 2018.

10. In or around April, 2018, the petitioner filed information vide Case No. 11/2018 before the Competition Commission of India against the respondents for abuse of dominant position and anti-competitive agreement/practices. The same has also been dismissed vide Order dated 30th May, 2018. An Appeal was preferred before the National Company Law Appellate Tribunal vide Competition Appeal No. 52/2018 which has also been dismissed vide Order dated 25th November, 2019.

11. Thereafter, the petitioner issued the Notice dated 18th July, 2018 for invoking arbitration for referring the matter for composite arbitration between the petitioner and the respondents in terms of the decision of the Supreme Court in Chloro Controls India Pvt. Ltd. vs. Severn Trent Water Purification Inc. &Ors. (2013) 1 SCC 64.

12. It is asserted that the respondent Nos. 1 and 2 vide Letters dated 07th August, 2018 and 09th August, 2018 respectively have refused to refer the disputes to arbitration and the petitioner has also been making an endeavours to arrive at an amicable settlement, but all the attempts went in vain.

13. A prayer has, therefore, been made that Arbitrator be appointed to adjudicate the disputes between the parties.

14. The respondent No. 2 in its Reply has asserted that there is no pending dispute between the petitioner and the respondent No. 2 for adjudication by the Arbitral Tribunal in terms of various Agreements. It is asserted that the loans extended to the petitioner by the respondent No. 2 have already been recalled and on account of default in repayment of overdues, an Insolvency Petition has already been filed before the NCLT, Ahmedabad which is pending adjudication.

15. It is submitted that various objections had been taken by the petitioner before the NCLT, Ahmedabad, but all have been dismissed, and the petitioner has been admitted into insolvency, by observing that there was a clear admission of debts and default. Aside from this, in the petition under Section 9 of A & C Act, 1996 filed by the petitioner, the respondent No. 2 was neither a party nor any cause of action was claimed to have arisen qua respondent No. 2. The Notice of Invocation of Arbitration dated 18th July, 2018 has been issued as an

afterthought after the respondent No. 2 initiated insolvency resolution proceedings against the petitioner-Company.

16. It is claimed that all the dues and debts of the petitioner are under Corporate Insolvency Resolution Process and any reference to arbitration would result in re-determination of an already determined default.

17. It is, therefore, submitted that the petition is mala fide.

18. The respondent No. 2 has further asserted that the petitioner has entered into two different sets of Agreements executed between two different entities; the present common petition with the prayer for a composite arbitration involving four different Agreements is not maintainable in law.

19. The Notice of Invocation is also misconceived and is contrary to the contractual provisions executed between the petitioner and the respondent No. 2. Paragraph 8 of the Notice of Invocation is relevant which reads as under:

"8. Parsoli shall issue another letter proposing name of the arbitrator within two weeks. BMW Group is hereby called upon to propose an arbitrator within two weeks of receipt of this letter."

20. It is claimed that the communication dated 18th July, 2018 cannot even remotely be termed as Notice of Invocation of Arbitration under Section 21 of A & C Act, 1996. This baseless communication is against the contractual procedure between the petitioner and respondent No. 2.

21. It is asserted that a similar petition with the similar background involving the respondent No. 2 in the case of Libra Automotives Private Limited vs. BMW India Private Limited & Anr. ARB.P. 163/2019 has been dismissed on 09th July, 2019 wherein this Court held as under:

"..It can also not be ignored that the invocation of the arbitration agreement is also misconceived. The invocation notice is unspecific and not as per procedure prescribed under the arbitration agreement. Petitioner has not proceeded as per the agreed procedure under any of the Arbitration Agreements. The Petitioner has rather called upon the Respondents to agree to an arbitration mechanism contrary to the agreed procedure prescribed under the Agreement. The invocation is thus contrary to the contract and wholly misconceived."

22. It is further submitted that the respondent No. 2 is a licensed Non-Banking Financial Company and provides wide range of financial services/facilities to car dealers and customers. Admittedly, two Financing Facility Agreements were entered into between the petitioner and the respondent No. 2, namely, FFA dated 15th November, 2010 and the WCDFA dated 28th June, 2014.

23. It is submitted that in terms of FFA, the petitioner was given a working capital limit to be utilized in a cycle of one year as per the needs and requirements of the petitioner.

24. The scope of FFA and WCDA were therefore, distinct and were executed on different dates. The Arbitration Clause in both the Agreements is also separate and distinct. Moreover, the Arbitration Clauses in the two Agreements between the petitioner and the respondent No. 1 and those with the respondent No.2 are different in respect of the seat of arbitration as well as constitution of the Arbitral Tribunal.

25. It is further asserted that while the petitioner is seeking a composite referral to arbitration for adjudication of all the disputes with respondent Nos. 1 and 2 respectively, this is not permissible as there is no tripartite Agreement between the parties, much less, common Arbitration Clause. If these claims which are based on separate distinct contracts are consolidated, it would run contrary to law and would also be not convenient.

26. It is asserted that none of these Agreements inter se entered into between the parties are interconnected in any manner. A reference has been made to the decision of the Hon'ble Supreme Court in Deutsche Post Bank Home Finance Ltd. vs. Taduri Sridhar (2011) 11 SCC 375, wherein it was observed that where a party entered into two Contracts with two separate entities each containing an Arbitration Clause, the claim filed by petitioner against another party viz. the third party, cannot be impleaded as a party.

27. It is, therefore, submitted that the present petition is not maintainable. Even otherwise, it is stated that the petition is not maintainable on facts. The claims have been raised by the petitioner against the respondent Nos. 1 and 2 are distinct and respondent Nos. 1 and 2 are not privy to any of the transactions. The cause of action against the respondent No. 1 is non-renewal of Dealership Agreement with which the respondent No. 2 has no concern. It is, therefore, submitted that the present petition is without any merit and is liable to be dismissed.

28. The respondent No. 1 in its Reply has asserted that there is a mala fide attempt on the part of the petitioner to mislead this Court; the petition was filed way back on 09th December, 2019, but was kept under defect with the Registry till such time the petitioner got listed the petition before this Court on 02nd June, 2020. This is further evident from the fact that the baseless Notice of Invocation of Arbitration dated 18th July, 2018 has been issued to both the respondents to which the Reply dated 07th August, 2018 has already been filed.

29. It is asserted that the present petition is not maintainable either in law or in facts on the ground that the Agreements are independent between the petitioner and the respondent No. 1 and between the petitioner and the respondent No. 2. Moreover, Arbitration Clauses as contained in the Agreements are independent and distinct and provide a distinct mechanism for referral of matters to arbitration.

30. Even on facts, there is no case made out as the matter is already pending consideration before NCLT, Ahmedabad. It is stated that the present petition is

without merit and is liable to be dismissed.

31. Written Submissions perused and Submissions heard.

32. The petitioner, Parsoli Motors Works Pvt. Ltd. has filed the present petition under Section 11 of the Arbitration & Conciliation Act, 1996 for appointment of an Arbitrator in respect of four Contracts, the details of which are as under :

(i) Dealership Agreement dated 14.01.2015 executed between Petitioner and Respondent No.1;

(ii) Deferred Payment Facility Agreement (DPFA) dated 15.11.2010 executed between petitioner and respondent No.1;

(iii) Floor plan Financing Agreement (FPFA) dated 15.11.2010 executed between petitioner and respondent No.2; and

(iv) Working Capital Demand Credit Facility Agreement(WCDCFA) dated 28.06.2014 executed between petitioner and respondent No.2.

33. The Dealership Agreement dated 14th January, 2015 read with renewal letter dated 19th January, 2017 with respondent No.1 BMW India Pvt. Ltd was essentially to sell BMW cars and its parts and to use BMW brand logo and name in the territory of Gujarat. In addition, the Deferred Payment Facility Agreement with respondent No.1 was to avail an evolving credit line in order to purchase BMW India's cars and other parts. The Credit Line in this Agreement enabled respondent No.1 to defer the payment of outstanding invoiced amounts raised by the petitioner towards sale of BMW cars and parts thereof. This Agreement was essentially entered into between the petitioner and respondent No.1 to enable the petitioner to seek financial assistance from respondent No.2 in order to effectuate the Dealership Agreement.

34. The Floor Plan Financing Agreement with respondent No.2 BMW India Financial Services Pvt. Ltd. was to provide financial facilities to the petitioner for the purpose of availing the financial facility to honour the Dealership Agreement with respondent No.1. In addition, the Working Capital Demand Facility Agreement with respondent No.2 was to facilitate the working capital requirements and demands of the petitioner.

35. The first objection which has been taken on behalf of the respondents is that these are four independent Contracts for which there cannot be one composite referral to the Arbitrator. While the petitioner has strenuously tried to establish that all the four Agreements were inter-dependent and working of one was facilitated by the other, but it cannot be overlooked that these were four independent Agreements, two with respondent No.1 and two with respondent No.2. It may be that the Working Capital Demand Credit Finance Facility Agreement may have been entered into with respondent No.2 in order to honour the Dealership Agreement with respondent No.1 and the other two were ancillary Agreements for facilitating this Agreement, but the fact remains that each was

an independent Agreement. There may have been some interdependency in so much as for discharging the obligations under one Agreement, the petitioner may be getting requisite support from the other Agreements, but that in itself cannot be a ground to refer the four matters as one composite matter for arbitration to a single Arbitrator.

36. The respondent has further claimed that all four Agreements have a separate mechanism for arbitration. The same may be stated as under :

(i) The Dealership Agreement and the Deferred Payment Facility Agreement with respondent no.1, in their respective arbitration clauses, require the parties to appoint a three-member tribunal while the Floor Plan Financing Agreement and the Working Capital Demand Credit Facility Agreement with respondent No.2 require the parties to appoint a sole arbitrator.

(ii) The place of arbitration under the Dealership Agreement is Delhi while the place of arbitration under the Deferred Payment Facility Agreement is Gurgaon. In the two Agreements with respondent No.2 the place of arbitration was to be determined by respondent No.2

(iii) The Dealership Agreement requires the parties to comply with a pre-arbitral Consultation Procedure before invoking arbitration.

37. It is argued that since the mechanism and the place of arbitration has been envisaged differently under the four Agreements, they all cannot be subjected to the same procedure or to the same arbitration. In this regard it may be observed that while the Supreme Court in *Indian Oil Corporation Ltd. vs. Raja Transport Pvt. Ltd.* (2009) 8 SCC 520 had opined that while considering an application under Section 11(6) of the Act, the procedure for appointment of an Arbitrator as prescribed in the Agreement be given effect to and the Court ought not to appoint an independent Arbitrator without resorting to the inbuilt mechanism as agreed between the parties. Yet at the same time, the Supreme Court in *Deep Trading Company vs. Indian Oil Corporation &Ors.*, (2013) 4 SCC 35 observed that, in certain exceptional circumstances where the parties have not been at consensus ad idem for agreeing to the procedure as envisaged in the Agreement, the Court is not powerless to make the appointment of an Arbitrator notwithstanding the choice of specified forum agreed between the parties. Here in the first instance, the parties have not been able to agree to the envisaged procedure and mechanism under the four Contracts and in these circumstances, the parties cannot be left without any remedy and this Court is well within its competence to entertain the petitions and appoint the Arbitrator.

38. The second objection is in respect of the place of conducting the arbitration. The place of conducting the arbitration is only a venue as per the forum conveniens where the parties may hold the arbitration proceedings, and this is essentially for the parties to determine. The parties by virtue of the present petition have chosen to submit themselves to the jurisdiction of this Court and thus, the place or the venue even if different, cannot be a ground to reject the

petition. The Supreme Court in *Mankastu Impex Pvt. Ltd. vs. Aircual Ltd.* (2020) 5 SCC 399 had observed that the seat and venue of arbitration need not be one and the same. The venue of an arbitration is the physical location where the proceedings are conducted and are determined based on the convenience of the parties and is solely their prerogative. This determination of venue, however, does not affect the right of the parties to determine the law governing the arbitral proceedings.

39. The third objection which has been taken is that there cannot be a composite referral of the disputes under the four Agreements with respondent Nos.1 and 2 to a common arbitrator. While the petitioner has vehemently made an attempt to show that all these four Agreements are inter-connected and have been entered into to facilitate the Dealership Agreement, but as already observed they all are independent. The petitioner has made a reference to *Chloro Controls* (supra) in its support, wherein it was observed that the attendant question was whether the mother Agreement cannot be performed without the aid of the supplementary or the ancillary Agreements. Considering the composite nature of the agreements, the Court may consider a composite referral of such parties to serve the ends of justice and even a non-signatory party may also be referred for arbitration. The group of Companies doctrine was invoked to bind the non-signatory affiliates if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as non-signatory parties.

40. In the present case, this Court need not devolve into this aspect any further since the petitioner itself has made an alternate prayer that though one petition under Section 11 of the Act has been filed, the Arbitrator may be appointed separately for the four Agreements.

41. The respondent had also taken a connected objection that one Notice of Invocation of Arbitration dated 18th July, 2018 had been sent by the petitioner, which did not define the disputes specifically.

42. The standard of compliance under section 21 of the Act came for consideration in *Prasar Bharti vs. M/s Multi Channel (India) Ltd.* 2005 (Supp) Arb. LR 245, where the Notice of Invocation under Section 21 was addressed to Director General who is the appointing body, and a copy was endorsed to the respondent. It was observed that the object of giving a Notice of Invocation is essentially to put the other party to Notice that there are disputes which the party intends to refer to Arbitration. This is to enable the other party to resolve the disputes, if possible, and/or to agree on the Arbitrator in terms of the clause in their Agreement. The Notice as described above, was held to be sufficient compliance of the requirements under Section 21 as information regarding the dispute and the invocation of arbitration had been conveyed to the other party even if the Notice was not directly addressed to them.

43. In the present case as well, though there is one Notice of Invocation given, but it clearly states about the four Agreements and about the disputes between

the parties. The Notice of Invocation dated 18th July, 2018 may not have been artistically drafted but so long as it fulfills the objective, this technical ground cannot be considered as a ground for disallowing the present petition.

44. The respondents have made a reference to Vidya Drolia vs. Durga Trading Corporation 2021 (2) SCC 1 to state that there are no arbitrable disputes under the Dealership Agreement as the petitioner has failed to follow the procedure as envisaged in Clause 13.4 of the Agreement which stipulates the parties to undergo a consultation before invoking arbitration. This argument also does not hold water for the simple reason that there is no specific procedure for consultation and so long as the parties were corresponding with each other about their disputes and a Notice was given for invoking arbitration, the pre-requisite of consultation is essentially met.

45. The respondents have further contended that the alleged disputes are deadwood and need not be referred to arbitration. It is asserted that an identical dispute has been adjudicated against the petitioner by the Competition Commission of India vide Order dated 30th May, 2018 which has been reaffirmed in the Appeal by National Company Appellate Law Tribunal (NCLAT) vide judgment dated 25th November, 2019 with an observation that the allegations leveled by the petitioner are merely a counter blast.

46. An identical issue as raised in the present petition was also raised before National Company Law Tribunal in I.A.300/2018 in CP (I.B) No.161/2017 which was dismissed vide Order dated 04th June, 2020. The Order was challenged in Appeal and the same was remanded back by the NCLAT for reconsideration, though the said directions of NCLAT have been stayed by Supreme Court of India vide Order dated 13th April, 2022 in CA No.2721/2022.

47. In this context, it may be observed that it is not a case where there are no arbitrable disputes. The parties may have approached NCLT or other Forums but the scope of adjudication before each of these Fora is independent and merely because the petitioner had approached Competition Commission of India or is a corporate debtor in the proceedings before the NCLT, cannot be held to be a bar to raise the disputes for adjudication by way of arbitration.

48. Considering that there is a valid Arbitration Agreement between the parties and in the light of the facts and discussions, Hon'ble Mr. Justice Manmohan Sarin, Retired Chief Justice (Jammu & Kashmir High Court), Mobile No. 9818000210, is hereby appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

49. The parties are at liberty to raise their respective objections before the Arbitrator.

50. This is subject to the Arbitrator making necessary disclosure as under Section 12(1) of A&C Act, 1996 and not being ineligible under Section 12(5) of the A&C Act, 1996.

51. The fees of the learned Arbitrator would be fixed in accordance with the Fourth Schedule to A&C Act, 1996 or as consented by the parties.

52. Learned counsels for the parties are directed to contact the learned Arbitrator within one week of being communicated a copy of this Order to them by the Registry.

53. A copy of this Order be also forwarded to the learned Arbitrator, for information.

54. The petition is accordingly disposed of in the above terms.